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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

ASHRAF YOUSSEF,

Plaintiff and Appellant,

v.

OSAMA SIDHOM et al.,

Defendants and
Respondents.

B288687

(Los Angeles County
Super. Ct. No. PC057652)

APPEAL from a judgment of the Superior Court of
Los Angeles County, Melvin D. Sandvig, Judge. Affirmed.

Leonard Chaitin for Plaintiff and Appellant.

Law Office of Michael L. Duncan and Michael Duncan; Law
Offices of Robin L. Haulman and Robin L. Haulman; and James
S. Link for Defendants and Respondents.

Plaintiff and appellant Ashraf Youssef alleged that defendants and respondents Osama Sidhom and Silvia Salem defrauded him and breached an oral contract. Under the alleged contract and misrepresentations, defendants agreed to purchase plaintiff's home in a short sale and promised to let him live there and receive the profits of any later sale. The alleged breach occurred when defendants sold the house and refused to give plaintiff the proceeds of the sale.

The trial court sustained defendants' demurrer to plaintiff's second amended complaint on the grounds that the alleged contract was illegal and violated the statute of frauds. The court rejected plaintiff's contention that his limited English proficiency excused his entry into an illegal contract, and further found that he failed to plead his fraud claim with the requisite specificity. The court did not give plaintiff leave to amend.

In this appeal, plaintiff contends the judgment should be reversed because he adequately alleged that respondents were more blameworthy than he was and unjustly benefited from the deal. He further argues that the trial court erred in making a factual finding about his English proficiency at the demurrer stage. We reject these contentions and affirm the judgment.

BACKGROUND

I. Second Amended Complaint

The trial court sustained defendants' demurrers to plaintiff's initial and first amended complaints with leave to amend. In the operative second amended complaint (SAC), filed September 7, 2017, plaintiff made the following allegations.

Plaintiff contacted defendants about purchasing his house after his efforts to obtain a loan modification failed. Defendants

agreed to purchase the house in a short sale “to help Plaintiff” and obtain the benefits of a tax deduction and a rental property tax credit. Plaintiff and defendants orally agreed that plaintiff would furnish the down payment and make the monthly mortgage payments of \$2,515.00. Plaintiff also agreed to make monthly payments of \$235.00 for expenses and \$900.00 for property taxes, and to pay for all maintenance and improvements to the house. In exchange, defendants would allow plaintiff to continue to live in the house and give him “the proceeds from the sale minus any capital gain paid” when they sold it.

Defendants purchased the home for \$602,500 in a March 2014 short sale. In connection with the short sale, plaintiff and defendants signed a “short sale affidavit” with Nationstar Mortgage. Plaintiff alleged that he “did not understand what he signed and neither Dr. Sidhom nor [plaintiff’s real estate agent] explained to him what he was signing.” He further alleged that he “was never given a copy of the Affidavit and doesn’t know its contents.” We likewise do not know the contents of the affidavit; it is not in the appellate record.

Plaintiff began making his agreed-upon payments, which he characterized as “rental payments,” to defendants in April 2014. In February 2015, defendant Sidhom advised plaintiff that he planned to list the house for sale. Sidhom further told plaintiff that plaintiff’s lease of the house would be converted to a month-to-month tenancy as of April 1, 2015.

Defendants listed the house for sale in March 2015. The house did not sell until more than a year later, in May 2016; prior to the sale, plaintiff spent over \$75,000 in repairs and improvements. The final closing statement “showed sale price of \$870,000, \$28,997 payable to the State of California to Franchise

Tax Board . . . and \$323,601.20 Proceeds Due Seller.”

In July 2016, plaintiff informed defendant Sidhom’s brother about the repair and improvement expenditures he had incurred. In November 2016, plaintiff’s attorney sent a letter regarding tax and accounting issues to defendants’ attorney. Defendants’ attorney responded with a document listing defendant Sidhom’s estimated tax liabilities. Plaintiff alleged that document, which he attached to earlier versions of the complaint but omitted from the SAC, stated that the proceeds from the May 2016 sale were \$356,198.20. Of that, \$261,305.00 was disbursed, and \$94,893.20 was withheld for taxes. Defendants’ attorney also sent a letter “outlining and documenting accounting regarding the house.” That letter, included with previous complaints, also was omitted from the SAC.

Defendants’ attorney sent plaintiff’s attorney another letter in January 2017. That letter “indicat[ed] that Dr. Sidhom will deduct attorney’s fees and costs associated with the ‘defense’ of Plaintiff’s meritless and potentially unlawful claim from [*sic*] any residual proceeds from the sale of the house.” Plaintiff’s attorney responded to “the accounting including exhibits” in February 2017. Plaintiff also hired an accountant to perform an accounting, which showed “a balance owed to Plaintiff by Defendants of \$254,738.20.” None of these documents were attached to any of the complaints.

In his first cause of action, for breach of oral contract, plaintiff incorporated the above allegations. He additionally alleged that he performed all of his obligations, and that defendants breached the agreement when they sold the house and refused to pay him “what is owed,” “\$254,738.20 minus any capital gains taxes paid by Defendants.” Plaintiff further alleged

that the oral contract could “be taken outside the statute of frauds” due to defendants’ oral and written confirmation of the agreement and plaintiff’s performance and detrimental reliance (i.e., promissory estoppel). Plaintiff outlined several “substantial steps to his detriment,” including “(1) agreeing to sell the property to Defendants in short sale; (2) making the mortgage payments without getting a tax benefit; (3) making the property tax payments without getting a tax deduction; (4) paying over \$75,000 in improvements, maintenance and repairs in order to get the property in a shape where it can be sold at a profit; (5) did not buy another house, but instead make [*sic*] the mortgage payments and expenses on Defendants’ property.”

In his second cause of action, for fraud by intentional misrepresentation and promise without intent to perform, plaintiff incorporated his previous allegations and further alleged that defendants made false representations of material fact to him in April 2014. Specifically, they told plaintiff they wanted to help prevent him from “losing his house” by buying the home in a short sale and later giving him the proceeds when they sold it. They told him they were willing to help in this way if he “makes all the mortgage payments, property tax payments, property insurance payments, pay [*sic*] for all the repairs, maintenance, utilities, and other expenses related to the property.” Defendants further assured plaintiff that they “were only interested in the tax benefits from owning an investment property and were interested in deducting the mortgage interest, property taxes, insurance, repair and maintenance costs and other expenses related to the property from their taxes and later claiming a \$30,000 credit when the property is sold.” Plaintiff alleged these representations were knowingly false, because defendants

intended “to use him for their own benefit by not only claiming all the deductions and using the property to save money on their tax returns, but also to keep all the proceeds from the sale and not pay Plaintiff as promised.” He further alleged that defendants intended to defraud him and induce him to sell his house to them under the terms of the oral agreement.

Plaintiff alleged that he believed defendants’ representations were true and acted in justifiable reliance on them. As a result, he was damaged by “(1) selling his house in a short sale without getting any equity appreciation; (2) paying mortgage payments without getting any tax benefits; (3) paying property taxes without getting tax benefits; (4) paying insurance premiums on the house without getting any tax benefits: [*sic*] (5) paying for over \$75,000 in repairs, maintenance and improvements to the property in order to prepare it to be sold.” He also “suffered severe emotional distress because of the conduct of the Defendants,” whom he “thought were friends and respectable physicians who were highly regarded in the Egyptian community.” Plaintiff alleged that defendants acted with malice and fraud as defined in Civil Code section 3294, and therefore should be liable for punitive damages.

II. *Demurrer*

Defendants filed a demurrer, in which they argued that the “gravamen of Plaintiff’s second amended complaint is based on allegations that seek enforcement of an agreement to commit an unlawful act, which is thereby void and unenforceable.”¹

¹Defendants filed a separate motion to strike plaintiff’s demand for emotional distress damages, on the ground that such damages are not available in connection with real property transactions. Plaintiff filed a notice of non-opposition to the

Specifically, they argued that the agreement violated Civil Code sections 2945 and 2945.4 and 18 U.S.C. section 1344. Defendants also asserted that plaintiff's allegations "demonstrate that he *benefited* from his alleged scheme," in that he was saved from losing his house and got to pay rent to stay in it. They accurately noted that documents plaintiff attached to his previous complaints but omitted from the SAC showed that \$261,305 of the proceeds from the sale were paid directly to plaintiff or used to pay off his debts.

Defendants further argued that neither the breach of contract claim nor the fraud claim was adequately pled. They contended that the contract claim was barred by the statute of frauds, and that plaintiff's attempt to invoke promissory estoppel to circumvent the statute of frauds could not succeed because he did not suffer hardship or unconscionable injury. As to the fraud claim, defendants argued that it must fail due to its foundation upon an illegal act as well as plaintiff's failure to plead it with requisite specificity. They further contended that the sham pleading doctrine barred plaintiff's claims of misrepresentation, because the previous complaints and their attachments showed that plaintiff "received monies and that the only sale proceeds withheld from the sale proceeds [*sic*] by Defendants was the sum of \$94,890.20 for tax liability, or '*capital gains taxes*' as referred to in the SAC."

III. *Opposition*

Plaintiff opposed the demurrer. He contended that the

motion. The court ultimately concluded the motion was moot due to its ruling on the demurrer, but noted it would have granted it in light of plaintiff's non-opposition. The motion to strike is not at issue in this appeal.

SAC “clearly specifies all the elements needed for breach of contract.” He further asserted, “It is clear from the allegations in the SAC that Plaintiff, who is not fluent in English, did not understand or was never told that he was entering an illegal contract when he was assured by [his real estate agent] and Defendant, Dr. Sidhom [*sic*] that they were going to help him stay in his house. . . . Had Plaintiff knew [*sic*] that he was entering into an illegal contract where he will end up losing his house and end up with no money, only litigation, he would have never entered into this contract. . . . Had Plaintiff knew [*sic*] that the contract he was entering into was illegal in anyway [*sic*], he would have used the money he lost in buying another house or finding other suitable residence.”

Notwithstanding these seeming admissions that the contract was illegal, plaintiff further argued that defendants “failed to establish that the subject contract was for an illegal purpose,” for several reasons: (1) “[t]he lender was made whole in the process, not defrauded,” such that 18 U.S.C. section 1344 was not applicable; (2) Civil Code sections 2945 and 2945.4 were not applicable because plaintiff is not a “foreclosure consultant” as defined in and governed by those statutes; and (3) “[t]here was no illegality in securing help from a friend, who would be compensated for his financial assistance in the mutually agreed manner.” Plaintiff also argued that “equitable reasons” required enforcement of the contract, because otherwise defendants would get to keep “Plaintiff’s money which he worked hard to get,” and it would “be totally unjust enrichment for the Defendants who are sophisticated buyers, speak good English, understood the contract and chose to enter into it for their own financial gains.”

Plaintiff further challenged defendants' contention that the alleged oral contract violated the statute of frauds. He argued that there were "special circumstances [that] serve as exceptions to the Statute of Frauds," including "*several e-mails and text messages that confirm[] the agreement between Plaintiff and Defendants,*" "several admissions in front of several witnesses that the agreement exists," plaintiff's "fully and partially perform[ance] of his duties under the agreement," and promissory estoppel, "since Plaintiff, in justifiable reliance on their promises, took substantial steps to his detriment and was damaged as outlined in the Second amended [*sic*] Complaint." Plaintiff stated that he "changed his position by foregoing [*sic*] his efforts to do a loan modification, finding other suitable housing and relying on Defendants' representations that they will help him keep his house." Plaintiff urged the court to overrule the demurrer and requested leave of court to file an amended complaint if necessary.

IV. *Ruling*

The trial court heard the demurrer on December 13, 2017. The record does not contain a reporter's transcript of the hearing or a minute order reflecting the events that transpired. It contains only a judgment reflecting that the sustained the demurrer without leave to amend, and a notice of ruling that is missing a page and includes what appears to be a tentative ruling that we infer the trial court adopted as its final ruling.

In that ruling, the court concluded that the illegality of the contract "is fatal to both claims." The court rejected plaintiff's claim that any illegality should be excused by his lack of English fluency. It stated, "[plaintiff]'s lack of fluency in English is belied by the fact that he filed his original and First Amended

Complaints while representing himself. Even if [plaintiff] is not proficient in the English language, it was his responsibility to have the contract or contracts (the short sale agreement and the oral contract) translated. A party who signs a contract is presumed to have read and understand [sic] its contents.” The court alternatively held that “[e]ven if the underlying contract had a lawful objective, the claims for breach of contract and fraud are still, for the third time, insufficiently pled.” It explained that the contract claim failed because plaintiff “failed to allege sufficient facts to establish an exception to the statute of frauds,” and that his “reliance on estoppel is without merit as he has not alleged facts to establish that [defendants] were unjustly enriched or that he suffered a substantial hardship based on the promise.”

The court explained that the fraud claim failed because it was “still not pled with the requisite factual specificity as to when the misrepresentations were made, where and to whom.” Further, the court found, “the basis for the fraud claim is still not clear as the ‘Accounting’ attached to the First Amended Complaint seems to negate the allegation of a promise made without intent to perform.”

Plaintiff timely appealed.

DISCUSSION

I. *Standard of Review*

A demurrer tests the sufficiency of a plaintiff’s complaint, that is, whether it states facts sufficient to constitute a cause of action upon which relief may be based. (Code Civ. Proc., § 430.10, subd. (e).) “In reviewing an order sustaining a demurrer, we assume well-pleaded factual allegations to be true and examine the complaint de novo to determine whether it

alleges facts sufficient to state a cause of action on any legal theory. [Citation.]” (*Kyablue v. Watkins* (2012) 210 Cal.App.4th 1288, 1292.) As the appellant, plaintiff bears the burden of overcoming all of the legal grounds on which the trial court sustained the demurrers. (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 880.)

II. *Analysis*

In the demurrer, defendants argued that the alleged oral contract underlying plaintiff’s claims was illegal. Plaintiff essentially conceded as much in his opposition to the demurrer, and does so in his briefing here. This concession is fatal to his contract claim.

It is well settled that a party to an illegal contract cannot come into a court of law and request that his or her illegal object be carried out. (*Yoo v. Jho* (2007) 147 Cal.App.4th 1249, 1255.) “The reason for judicial refusal to enforce a contract which has an illegal object ‘is not that the courts are unaware of possible injustice between the parties, and that the defendant may be left in possession of some benefit he should in good conscience turn over to the plaintiff, but that this consideration is outweighed by the importance of deterring illegal conduct. Knowing that they will receive no help from the courts and must trust completely to each other’s good faith, the parties are less likely to enter an illegal arrangement in the first place.’ [Citation.]” (*Ibid.*)

Plaintiff contends this rule should not apply in this case because “the two parties were not in *pari delicto* and . . . respondent [*sic*] was far more at blame than appellant. Thus, *McAllister v. Drapeau, et al.* (1939) 14 Cal.2d 102, 112 is applicable requiring relief to be granted.”² We disagree.

²Defendants contend this argument is forfeited because it

In *McAllister*, the plaintiffs “were in imminent danger of losing their home property by sale under or foreclosure of the deed of trust.” (*McAllister, supra*, 14 Cal.2d at p. 103.) They sought relief through the Home Owners’ Loan Corporation (H. O. L. C.), a Depression-era federal “instrumentality” authorized “not only to refinance loans of home owners who were faced with foreclosure, but also to make loans to home owners for the purpose of redeeming or repurchasing home properties already foreclosed or sold under a deed of trust or power of sale.” (*Id.* at pp. 105, 106.) The legislation creating the H. O. L. C. “contemplated that the creditor would, in many cases, accept bonds in an amount less than the indebtedness due him.” (*Id.* at p. 106.) Related rules and regulations “provided that the H. O. L. C. would not refund the first mortgage if the creditor demanded a second unless the financial ability of the debtor and the financial arrangements were such that the debtor would have a reasonable opportunity to pay off both mortgages.” (*Id.* at p. 109.) “Obviously, before these facts could be ascertained, a full disclosure of the amount and the terms of the proposed second lien would have to be made to the H. O. L. C. The securing of a second lien by the creditor without such disclosure is clearly in violation of the letter and spirit of the statute and regulations” and “violates the basic public policy expressed in the act.” (*Ibid.*)

The plaintiffs’ creditor “would only consent to take said

was not stated under a separate heading as required by California Rules of Court, rule 8.204(a)(1)(B). Plaintiff urges us to consider his argument despite his failure to comply with rule 8.204(a)(1)(B) because the argument was “clearly stated” and defendants were “clearly not prejudiced.” We exercise our discretion to consider this and plaintiff’s other arguments despite the deficiencies in his briefing.

bonds of H. O. L. C. on the condition that plaintiffs execute a note for \$1,300, secured by a second trust deed' on their home property.” (*McAllister, supra*, 14 Cal.2d at pp. 103-104.) The second trust deed was not disclosed to H. O. L. C., which accepted plaintiffs’ application for relief and entered into an agreement with their lender to pay off their first mortgage. (*Id.* at p. 104.) The plaintiffs repaid a portion of what they owed on the second lien, but then sued their lender’s successor in interest to cancel the note and recover the amounts paid. (*Id.* at p. 105.) The trial court ruled in the plaintiffs’ favor, and the Supreme Court affirmed. (See *McAllister, supra*, at pp. 103, 113.)

The Supreme Court rejected the defendant’s argument that the plaintiffs could not seek relief because they knowingly entered into the illegal second mortgage. (*McAllister, supra*, 14 Cal.2d at p. 113.) It explained: “It is, of course, true that where parties are *in pari delicto* neither can secure affirmative relief at law or equity. But it is equally true that where one party is involved to some extent in the illegality, but where the second party is grievously at fault and the first party only slightly at fault the court will allow recovery of moneys paid by the first party under the executory contract.” (*Id.* at p. 112.) The Court found the exception had “obvious application to the facts of the instant case,” because the plaintiffs, facing foreclosure, “were in desperate circumstances” and acted “as any reasonable and prudent man would have acted under the circumstances.” (*Ibid.*) The court also noted that the H. O. L. C. was designed to protect people like the plaintiffs, not the lender. For these reasons, the Court concluded that the plaintiffs were not *in pari delicto* with the lender and were entitled to seek relief. (*Ibid.*)

McAllister is distinguishable from the instant case.

Although plaintiff also faced foreclosure, he was the instigator of the illegal oral agreement with defendants. He alleged that he initiated contact with defendants, who agreed to help him evade the consequences of the short sale. Plaintiff, who further alleged that he had sufficient cash to furnish a sizeable down payment on the house despite his inability to satisfy his mortgage obligations, thus was by his own allegations *in pari delicto* with defendants.

Plaintiff also contends that he made a sufficient showing of “great hardship and unjust gains” to defendants to warrant relief, because he “made hundred thousands [sic] of dollars in down payment and payments and [defendants] paid nothing.” Plaintiff does not provide any citations to authority to support this argument, which we do not find persuasive. Plaintiff alleged that he made all of his payments directly to defendants; the only reasonable inference is that defendants in turn paid the amounts they owed on the home they now owned.

Moreover, attachments to plaintiff’s previous complaints showed that defendants distributed over \$200,000 in proceeds from the home sale to defendant or his creditors and withheld funds to pay capital gains taxes—in accordance with the alleged agreement and contrary to plaintiff’s allegations in the SAC. It is not permissible to omit harmful allegations or documents included in a previous pleading to avoid a demurrer. Subsequent pleadings that do this are considered invalid “sham pleadings” unless the plaintiff proffers a plausible explanation for dropping the harmful allegations. (*Smyth v. Berman* (2019) 31 Cal.App.5th 183, 195.) Plaintiff provides no such explanation here.

Instead, he reiterates his allegation that he is not fluent in English and contends that the trial court erred in finding that he was. We are not persuaded the court made any such finding. Its ruling stated that plaintiff's "claim of lack of fluency in English is belied by the fact that he filed his original and First Amended Complaints while representing himself," and concluded that plaintiff's English proficiency was not relevant because a lack of fluency does not excuse a purported lack of understanding. Moreover, plaintiff provides no authority for his contention that the court "erred in making such a factual finding at the demurrer stage." He thus has not carried his burden of showing that any error by the trial court warrants reversal.

Plaintiff also has failed to carry his burden of showing that the court erred in sustaining the demurrer to his fraud claim. He makes no argument regarding that cause of action. We accordingly have no basis to overturn the trial court's judgment dismissing it.

DISPOSITION

The judgment is affirmed. Defendants are awarded their costs of appeal.

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COLLINS, J.

We concur:

MANELLA, P. J.

WILLHITE, J.